Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of JAY PARKER,

Petitioners,

-against-

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE and OFFICER JOHN TALT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Second Circuit erred in affirming the District Court's dismissal of the petitioner's complaint alleging violation of civil rights against the defendant Nassau County, for the death of petitioner's son who was shot by a County police officer in the course of an attempted arrest?

2. Whether the Court of Appeals erred in affirming the District Court's use of a special jury verdict form which improperly restricted the issue to be decided by the jury?

3. Whether the Court of Appeals erred in affirming the District Court's order quashing a subpoena duces tecum for the production of the F.B.I. file regarding an investigation into the death of Jay Parker?

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OPINIONS IN COURTS BELOW

The unpublished memorandum and order of the United States District Court for the Eastern District of New York (Pratt, J.) dated April 14, 1982, directing the entry of judgment dismissing the complaint is reproduced at p. 15a.

The unpublished order of the United States Court of Appeals for the Second Circuit, dated October 21, 1982, affirming judgment, is reproduced at p. 20a.

JURISDICTIONAL STATEMENT

The judgment of the United States District Court for the Eastern District of New York was entered on April 22, 1982.

The United States Court of Appeals for the Second Circuit affirmed

on October 21, 1982.

Jurisdiction is conferred on this Court pursuant to Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE

Title 42 United States Code, Section 1981: Equal Rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

Title 42 United States Code, Section 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 C.F.R. Part 16, Sections 16.21, 16.22, 16.24 (reproduced in Appendix).

STATEMENT OF THE CASE

Petitioners brought an action in the United States District Court for the Eastern District of New York under 42

U.S.C. Section 1983, seeking damages arising from the death of their son, who was shot and killed by a Nassau County Police Officer during the course of an attempted arrest. The named defendants included the county and the police department, as well as the individual officers who participated in the arrest. The plaintiffs contended that the death of Jay Parker was the result of the use of excessive force by an inadequately trained officer.

During the course of the proceedings, several rulings were made by the trial court which petitioner contends had the cumulative effect of denying petitioners a fair trial, and which departed from the accepted and usual course of judicial proceedings.

Jay Parker, a black youth who was fifteen years old at the time of his death, was the son of a New York City police detective. On the evening of Feb-

ruary 9, 1980, he and a companion had been accused by four whites of attempting to rob them with an inoperable pellet gun outside a movie theater in a Nassau County shopping mall. Earlier that evening four white youths had been ejected from the theater by the security guards there, who know the four to be troublemakers and who refused to take any action regarding the alleged robbery attempt. However, a bystander, after making a racist remark, summoned the police. Both the security personnel and the police officers had been informed that Parker was carrying a pellet gun. Accompanied by the four white youths, Officers Boyle and Talt set off in an unmarked station wagon in search of Parker and his companion. They were spotted walking over a highway bridge in Queens. The officers jumped out of their car. Talt drew his weapon and took cover, which is the proper

police procedure. Boyle approached the boys with his gun drawn and ordered them to step over to the car and put their hands on the car. Parker, with the pellet gun in his left jacket pocket, did not comply. After the officer repeated his order, Parker withdrew only his right hand. The officer placed his left hand on Parker's left shoulder, put his gun to Parker's back, and again ordered Parker to remove his hand from his pocket. Parker slowly withdrew his hand from his pocket, and as he did so, the butt of the gun, which was too large to fit in the pocket, became visible. Officer Boyle fired two shots into Parker's back. The first shot entered Parker's stomach and was not fatal. The second, fatal shot entered his heart. He was pronounced dead upon arrival at the hospital.

ARGUMENT

It is petitioners' respectful contention that certain rulings by the District Judge in the case at bar, as upheld by the Second Circuit, give rise to important questions of federal law which have not, but should be settled by this Court, and which had the cumulative effect of depriving petitioners of a fair hearing by the jury.

First, the District Judge granted defendants' motion to dismiss the action as against the County at the close of the evidence for failure to make a prima facie case. This determination, involving municipal liability under the Civil Rights laws, was upheld by the Second Circuit relying upon Owens v. Haas, 601 F.2d 1242 (2d Cir., 1979), cert. denied, 444 U.S. 980 (1980). Petitioners contend that the issue was one which should have been deci-

ded by the jury subject to the court's review upon a motion for judgment n.o.v.

The issue of a municipal corporation's liability under 42 U.S.C. Section 1983 for the conduct of its agents and employees has been the subject of intensive judicial activity since this Court's landmark decision in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In Monell, the Court overturned Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and held that municipalities, as "persons" within the meaning of Section 1983, must answer in damages for civil rights violations. Although the doctrine of respondent superior was rejected in civil rights actions, Monell specifically held that liability will attach

> where...the action that is alleged to be unconstitutional implements or executes a policy

> statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 'person' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to a governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.

Monell, 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. The Second Circuit reached the conclusion in Turpin v. Mailet, 579 F.2d 152, that

> ...a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy-making level.

579 F.2d at 164. Thereafter, in Owens v. Haas, 601 F.2d 1242 (2d Cir., 1979), the Second Circuit held that municipal liabil-

ity under Section 1983 is not restricted solely to situations where a "violent incident" involving one of its employees is part of a pattern of conduct of which the county has knowledge. Ibid, at 1246. Although simple failure to supervise employees is not sufficient for Section 1983 liability, Owens stands for the proposition that failure to supervise or "lack of a proper training program...so severe as to reach the level of 'gross negligence' or 'deliberate indifference' will give rise to a §1983 cause of action," Ibid. Furthermore, and of particular importance for the case at bar, this Court has held that the "issue of authorization, approval or encouragement is generally one of fact, not law," Turpin v. Mailet, 619 F.2d 196, 199; see also, Stinson v. Sheriff's Department of Sullivan County, 499 F. Supp. 259 (S.D.N.Y., 1980). Consequently, the removal of this issue from

the jury's consideration takes on added significance.

Finally, it must be emphasized in this context that a municipality has no immunity under Section 1983 "and may not assert the good faith of its officers or agents as a defense..." Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398, 1409, 63 L.Ed. 673 (1980). The Supreme Court noted that the statute itself does not confer immunity to any officials nor public bodies and, therefore, the high Court has recognized an immunity only where it was historically established at common law at the time the Civil Rights Act was enacted, and where no conflict with the purposes of the act exist. Owen v. City of Independence, supra. Thus, although under Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), individual officers may invoke the defense of probable cause

or good faith in false arrest or malicious prosecution situations such as was present in Turpin, supra, or Owen, supra, no such defense is available to the municipal defendant.

Applying these guiding principles to the ruling by the District Court in the instant case, it is clear that the issue of the liability of these defendants was one for the jury to determine, and that the Second Circuit erred in its conclusion that there was a failure of proof on the issue of the officer's training by the defendant County. On direct examination of Officer Boyle, plaintiff's counsel elicited testimony regarding his training as a police officer. Boyle indicated that, in addition to his initial training, he received additional training in "weapon firing", "arrests under fire", "handcuffing" and "the use of nightsticks". His testimony

as to what, if any, training he received with regard to placing an allegedly armed suspect under arrest was vague at best. The County, having armed this individual and authorized him to use his weapon in the course of his duties, had the responsibility to ensure that the public was properly safeguarded. The issue of potential danger to Boyle (whether real or perceived) was emphasized by the trial court when it allowed the jury to consider only his defense of qualified immunity.

However, the danger to the community of an inadequately trained force of armed police was an issue which was foreclosed when the motion to dismiss was granted in favor of the County of Nassau. This was a question of fact which the jury alone should decide. It is the function of the jury, not the court, to weigh the evidence and evaluate the credibility of witnesses. A properly instructed jury

could have concluded that the County had exhibited "deliberate indifference" or "gross negligence" in its training program within the meaning of Owens v. Haas, supra. Moreover, the jury could also have reached the conclusion that Officer Talt's conduct had contributed to the death of Jay Parker. Had the jury done so, and if the Court disagreed as a matter of law, the option of granting judgment n.o.v. was still available to him. His precipitous action in removing these issues from the jury's consideration was highly prejudicial to the plaintiff and requires a new trial.

Second, at the close of the evidence, the trial court permitted the jury to consider, in the form of a special jury verdict, only the following question:

> Did defendant Boyle reasonably believe that shooting Jay Parker was necessary to protect himself or others from imminent use of deadly force?

It is petitioners' respectful contention that the special verdict form was structured in such a way as to preclude the jury from considering important factual issues involving the propriety of other portions of the officers' conduct during the course of the attempted arrest of Jay Parker, and that this prejudiced the plaintiffs' case so severely as to require that a new trial be granted.

The District Court's initial determination, that the "reasonableness" of Boyle's conduct was in issue, was not fully nor correctly embodied in the special verdict form which was ultimately presented to the jury. Counsel for the plaintiff was not put on notice that the trial court intended to limit the issue of reasonableness to the single act of the actual shooting of Jay Parker by Officer Boyle, and thus he had no opportunity to object. Nevertheless, the Court of

Appeals relied on the absence of an objection in affirming the procedure. Due to the unreasonably narrow structure of the special verdict question, the jury was not permitted to consider whether Boyle was negligent in failing to take cover, as his partner had, or in the manner in which he placed Jay Parker under control. Had they been free to evaluate the totality of the officer's conduct, they could well have concluded that Boyle acted unreasonably prior to the shooting, and that he precipitated the death of Jay Parker by his conduct prior to the actual firing of his weapon. This is consistent with the plaintiffs' theory that Nassau County's training of its police officers was totally inadequate. By the use of the special verdict, the trial court impermissibly stripped the jury of an important aspect of its mandate as trier of the facts, and unreasonably narrowed

their inquiry to such a degree that their verdict did not reflect all of the factual issues raised by the evidence and which should have been placed before them.

Petitioners contend that a question may not be taken from the jury if reasonable men could reach differing conclusions regarding the issue, Baker v. Texas and Pacific Railway Co., 359 U.S. 227, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir., 1972); Julian J. Studley, Inc. v. Gulf Oil Corporation, 368 F.2d 161 (2d Cir., 1967). Although a special verdict may be used to remove "extraneous" matters from the jury's consideration, Leathers v. United States, 532 F. Supp. 1244, affirmed 471 F.2d 856, cert. den. 412 U.S. 932, 93 S.Ct. 2754, 37 L.Ed.2d 161, the question or questions asked must be "adequate to obtain a jury determination of the factual

issues essential to judgment," R.H. Baker & Co. v. Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir., 1964). The single question submitted in the case at bar was totally deficient in this respect, and that the error was an abuse of discretion which warrants the granting of a new trial. Petitioners respectfully contend that this procedure, as employed by the District Court and approved by the Court of Appeals, warrants review by this Court.

Third, petitioners contend that an important area of federal law is involved in the ruling by the District Court, upheld by the Court of Appeals, quashing petitioners' subpoena duces tecum for the production of the Federal Bureau of Investigation's file regarding its investigation into the death of Jay Parker. The Justice Department commenced the investigation in order to ascertain whether a violation of Parker's civil

rights had occurred. During pre-trial preparations and approximately four months before trial, petitioners sought, by order to show cause, an order compelling production of the F.B.I. file. After hearing oral argument, the District Court denied the application. Petitioners were advised to pursue the procedure set forth in 28 C.F.R. Part 16 to secure the records from the Justice Department, and did so. The Justice Department declined to make the file available to petitioners. Thereafter, at the time of trial, petitioners caused a subpoena duces tecum to be served upon the Assistant U.S. Attorney who represented the Justice Department during the investigation. The subpoena called for the production of "the entire F.B.I. file regarding the investigation of the death of Jay Parker," and had been marked as a proposed plaintiff's Exhibit. On the return date of the subpoena, the gov-

ernment moved to quash, asserting that after an internal Justice Department review, the government declined to produce the file. The District Court granted the motion to quash. Appellant respectfully contends that in so doing, the District Court denied him access to potential relevant evidence, the importance of which outweighed the government's interests in withholding the information.

At the outset, it should be noted that appellants complied with the provisions of 28 C.F.R. Part 16 after the order to show cause was brought on in District Court in December. It was his request, pursuant to Section 16.22, which set in motion the Justice Department's review alluded to by the District Court in his oral decision granting the motion to quash. Judge Pratt indicated that one of the factors which he considered in ruling on the motion was that the application

> ...came on very late and it was not until the very last minute that the problem was presented to the Court to resolve and the problem had actually begun to arise some three months ago.

However, the appellant attempted to avail himself of the aid of the Court in obtaining the files well in advance of trial. When he was unable to secure the records by means of the procedure set forth in the C.F.R., his only alternative was to issue the subpoena and bring the matter before the Court once again. The "last minute" application was the motion to quash brought on by the Government, not the appellant's request for production of the records.

In granting the motion to quash, Judge Pratt relied upon United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416 (1951), which was also relied upon by the Court of Appeals in affirming the judgment. However, that case con-

cerned contempt of court proceedings which were brought against the agent in charge of the F.B.I. investigation who refused to honor a subpoena duces tecum for production of the records of the investigation. An additional important factual distinction between Touhy and the instant case lies in the government's expressed willingness to cooperate in some measure with respect to the production of the subpoenaed records. In the case at bar, there was no offer of cooperation or of limited disclosure. Furthermore, the Touhy decision merely upheld the validity of the government's internal regulations respecting disclosure. Appellant herein does not dispute the authority of the government to issue such regulations. Rather, it is contended that the record does not contain an adequate showing as to the government's compliance with the applicable part of the C.F.R. and that in the absence

of such a showing, the District Court should not have granted the motion to quash.

In affirming the order of the District Court, the Second Circuit failed to address this important area of conflict between the individual's right to have access to information and the Government's claim to confidentiality. This Court has not passed on the question in the context of a federal civil rights action and Touhy, supra, is not dispositive. Petitioners contend that in the case at bar, involving the death of a young teenager with an unblemished record and exceptional promise, the balance should have weighed in favor of disclosure.

It is petitioners' respectful contention that the cumulative effect of the above rulings, as affirmed by the Court of Appeals, was to prevent a full and fair hearing of this claim for violation of

civil rights. Therefore, it is respectfully submitted that this writ sought herein should be issued and the matter reviewed by this Court.

Respectfully submitted,

ROBERT RIVERS, P.C.
Attorneys for Petitioners